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NO. 20926

IN THE UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

TERRY ALLAN WOLFE,

Appellant,

vs.

UNITED STATES OF AMERICA,

Appellee.

APPELLEE'S BRIEF

APPEAL FROM
THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA
CENTRAL DIVISION

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APPELLEE'S BRIEF

I

JURISDICTIONAL STATEMENT

Appellant Terry Allan Wolfe was indicted by the Federal Grand Jury for the Southern District of California, Central Division, on December 8, 1965, in Case No. 35562-CD [C. T. 2].[1/] The Indictment charged a violation of Title 50 Appendix, United States Code, Section 462, Universal Military Training and Service Act; Refusal to be Inducted.

On January 3, 1966, appellant was arraigned before the Honorable E. Avery Crary, United States District Court Judge and entered a plea of not guilty. Appellant was represented by

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1/ "C. T." refers to Clerk's Transcript of Record.

retained counsel at all stages of the proceedings. On January 24, 1966, Case No. 35562-CD was called for jury trial before the Honorable Peirson M. Hall, United States District Court Judge. The jury was impaneled and the trial was continued to January 25, 1966. On January 25, 1966, the trial in Case No. 35562-CD commenced before Judge Crary. Appellant was found guilty on that same date. On February 21, 1966, appellant was sentenced to the custody of the Attorney General for a term of 3 years and bond on appeal was set at $100 [C. T. 6]. A timely notice of appeal was filed on February 21, 1966, and appellant was released on bond pending appeal [C. T. 7].

Jurisdiction of the trial court was founded upon Title 50 Appendix, United States Code, Section 462 and Title 18, United States Code, Section 3231. This Court has jurisdiction pursuant to Title 28, United States Code, Sections 1291, 1294.

II

STATUTES INVOLVED

Title 50 Appendix, Section 462, United States Code, provides in pertinent part as follows:

> "Any member of the Selective Service System or any other person charged as herein provided with the duty of carrying out any of the provisions of this title . . . or the rules or regulations made or directions given thereunder, who shall knowingly fail or

neglect to perform such duty . . . or who otherwise evades or refuses . . . service in the armed forces or any of the requirements of this title . . . or who in any manner shall knowingly fail or neglect or refuse to perform any duty required of him under or in the execution of this title . . . or rules, regulations or directions made pursuant to this title . . . shall, upon conviction in any District Court of the United States of competent jurisdiction, be punished by imprisonment for not more than five years or a fine of not more than $10,000, or by both . . ."

Title 32 Code of Federal Regulations, 1641.2(b) provides in pertinent part:

"If a registrant or any other person concerned fails to claim and exercise any right or privilege within the required time, he shall be deemed to have waived the right or privilege."

Title 32 Code of Federal Regulations, 1625.2 provides in pertinent part as follows:

"The local board may reopen and consider anew the classification of a registrant . . . provided, . . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an order to report for induction (SSS Form No. 252) . . . unless the local board

first specifically finds that there has been a change in the registrant's status resulting from circumstances over which the registrant had no control."

Title 32 Code of Federal Regulations, 1625.4 provides in pertinent part:

"When a registrant . . . files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification, it shall not reopen the registrant's classification . . ."

Title 32 Code of Federal Regulations, 1642.2 provides in pertinent part:

"When it becomes the duty of a registrant . . . to perform an act or furnish information to a local board or other office or agency of the Selective Service System, the duty or obligation shall be a continuing duty or obligation from day to day and the failure to properly perform the act or the supplying of incorrect or false information shall in no way operate as a waiver of that continuing duty."

III

STATEMENT OF THE FACTS

At the time of the trial of this case a photographic copy of the official Selective Service System file for appellant was offered and admitted in evidence as Government's Exhibit No. 1 [R. T. 6]. [2/] This copy had attached to it a certificate by Captain T. D. Proffitt, U. S. A. F. (Ret.), District Coordinator, Selective Service System, that it was a full, true, and correct copy of the original file of which he had legal custody. Also attached was a certificate and seal of the Staff Secretary, Headquarters Southern area, Selective Service System, to the effect that Captain Proffitt was the District Coordinator and had custody of the original selective service file of the appellant.

This file and testimony of appellant during trial revealed the following events with respect to appellant's registration status in the Selective Service System:

Appellant registered with Local Board No. 134 on May 23, 1960, (SSS Form No. 1, pp. 1, 2). [3/] On July 2, 1962, Local Board No. 134, hereinafter referred to as "the Board", received from the defendant a completed Classification Questionnaire (Form SSS No. 100) wherein the defendant did not sign the section relating

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2/ "R. T." refers to Reporter's Transcript of Record.

3/ Refers to pages of appellant's Selective Service File, Government's Exhibit No. 1.

to "conscientious objector" (pp. 4, 7).

On May 14, 1963, the Board received from appellant the "Current Information Questionnaire" (SSS Form No. 127), wherein the appellant in no way noted that he claimed "conscientious objector" status (p. 14). On June 18, 1963 appellant was classified I-A, and on June 26, 1963, the notice of such classification (SSS Form No. 110) was mailed to him (pp. 3, 11).

On January 14, 1964, appellant was classified II-S, and a notice of such classification (SSS Form No. 110) was mailed to him, on January 24, 1964 (pp. 3, 11). On November 16, 1964, the Board reclassified appellant II-S, and on November 27, 1964, a notice of such classification (SSS Form No. 110) was mailed to him (pp. 3, 11). On January 6, 1965, the Board received a letter from appellant stating that he was graduating from San Diego State College on January 29, 1965, and that he intended to spend a semester in school at Mexico City studying spanish. Appellant requested the necessary forms for continuing his II-S classification (p. 23).

On February 11, 1965, appellant was classified I-A, and on March 2, 1965, the Board mailed to him a notice of such classification (SSS Form No. 110) (pp. 3, 11). Appellant made no written request for a personal appearance before the Board within ten days after the Board mailed the notice of classification of I-A (32 C.F.R. 1624.1(a)).

On March 15, 1965, the Board received from appellant a completed "Current Information Questionnaire" (SSS Form No. 127)

wherein appellant made no notation that he was a conscientious objector (p. 28). Attached to said questionnaire was a written statement by appellant wherein he stated that he was aware of his eligibility for the draft but would like postponement until completion of his education (p. 30).

On April 1, 1965, the Board mailed an order to appellant to report for a physical examination (SSS Form No. 223) (pp. 11, 32). Appellant did not file an appeal from his I-A classification within the period provided by the selective service regulations. 32 C. F. R., 1626. 2(c)(1) and (3). On April 27, 1965, the Board mailed a second order to appellant to report for his physical examination, having been informed by appellant that he had not received word of the first order to report for physical examination until April 11, 1965 (pp. 11, 35, 36).

On May 5, 1965, the Board received from appellant a written request for an interview for the purpose of appealing his I-A classification. The basis for his request was not that he was a conscientious objector but that he wished to return to college to complete the courses necessary for him to obtain a teaching credential (p. 37). On May 5, 1965, the Board noticed that the appellant had requested an interview and appeal but was late in filing the appeal (p. 11).

On May 25, 1965, a statement of appellant's acceptability for induction into the armed services (D. D. Form 62) was mailed to appellant (pp. 11, 38). On June 30, 1965, the Board mailed appellant an order to report for induction (SSS Form No. 252) on

July 27, 1965 (pp. 11, 39). On July 6, 1965, the Board received a letter from appellant in which he states that he wishes to notify the Board that, "Because of my religious and moral convictions, I cannot have on my conscience the fact that I have trained myself for the killing of human life . . . I am, therefore, this 3rd day of July applying for classification as a conscientious objector" (pp. 11, 40).

On July 12, 1965, the Board sent appellant "Special Form for Conscientious Objector" (SSS Form No. 150), which the Board received in a completed form from appellant on July 14, 1965. On July 26, 1965, the appellant completed a second SSS Form No. 150 in the office of the Board (pp. 11, 42, 48). On July 26, 1965, the Board mailed appellant a "Postponement of Induction" (SSS Form No. 264), postponing his induction until further notice (pp. 11, 52). The Board postponed appellant's induction to consider his SSS Form No. 150 which he had submitted as the special form for a conscientious objector (p. 53).

On August 4, 1965, appellant was present at the Board's request at a meeting of the Board regarding his claim as a conscientious objector. Appellant advised the Board " . . . that he had planned to be married in May or June but that it did not work out so he filed a claim as a conscientious objector. He stated the reason he had never claimed it before was not because he was ashamed but because he was afraid that people would laugh at him and criticize him . . ." (p. 56). On August 4, 1965, the Board decided that the ". . . SSS Form No. 150 and the results of the

interview did not warrant reopening of the classification" (pp. 11, 56). On August 6, 1965, the Board mailed a letter to the appellant advising him that the facts presented by appellant did not warrant reopening or reclassification of his case at that time (Form C-140) (pp. 11, 57).

On August 9, 1965, the Board received a letter from appellant wherein he stated that he continued to consider himself a conscientious objector and ". . . if I am given an induction notice I will report, but I will declare myself a conscientious objector to the army" (p. 58).

On August 10, 1965, the California headquarters of the Selective Service System advised the Board by letter that it had reviewed appellant's selective service file, and that the postponement of his scheduled induction should be withdrawn and a new reporting date should be established allowing appellant ten days within which to report (p. 60).

On August 11, 1965, the Board received a letter from appellant stating that he was requesting an appeal from the Board's decision not to reclassify him (p. 61). On August 12, 1965, the Board mailed a letter to appellant notifying him that the postponement of his induction was terminated, that the Local Board had made no change in his classification status after carefully reviewing his SSS Form No. 150 and the August 4, 1965 interview. Appellant was further advised that his order to report for induction remained in effect, and he was directed to report for induction on August 24, 1965, at 6:30 A. M., to 2100 North Main Street,

Santa Ana, California (pp. 11, 64).

On August 24, 1965, appellant reported for induction and on the same date refused to be inducted. After appellant was informed of the criminal penalties involved for a refusal, he was again asked to submit to induction but he refused to be inducted. He gave as his reason that he did not, nor had he ever, believed in military service of any kind. He stated that he did not believe in violence, that he could not conscientiously be a part of the armed services, that he was prepared to go to trial for the defense of his position, and could not cooperate in armed training. He said he would "agree to perform an alternative service in accordance with his church" (pp. 11, 65-67).

IV

QUESTIONS RAISED ON APPEAL

I. Did the trial court err in admitting in evidence the Selective Service System File of the appellant?

II. Was there a basis in fact for the local board's rejection of the classification claims of appellant?

III. Was the local board required to reopen the classification of appellant and reclassify him after he presented his so-called "new evidence"?

IV. Was appellant denied due process at his induction ceremony?

V

ARGUMENT

A. THE TRIAL COURT PROPERLY ADMITTED INTO EVIDENCE THE CERTIFIED PHOTOGRAPHIC COPY OF THE APPELLANT'S OFFICIAL SELECTIVE SERVICE FILE.

Rule 44(a), Federal Rules of Civil Procedure, provides that an official record or an entry therein, when admissible for any purpose, may be evidenced by a copy attested by the officer having legal custody of the record, and accompanied with a certificate that such office in which the record is kept is within the United States. The certificate may be made by any public officer having a seal of office and having official duties in the political subdivision in which the record is kept, authenticated by the seal of his office.

Title 28, United States Code, Section 1733, provides that records of account or minutes of proceedings of any department or agency of the United States shall be admissible to prove the act, transaction, or occurrence as a memorandum of which the same were made or kept. Rule 1733 also provides that properly authenticated copies of any books, records, papers, or documents of any department or agency of the United States shall be admitted into evidence equally with the originals thereof.

Rule 27, Federal Rules of Criminal Procedure, provides that an official record or any entry therein may be proved in the

same manner as in civil actions

Appellant contends that the trial court erred by admitting into evidence a bound photographic copy of his original selective service file. This document had been attested and certified in compliance with the above mentioned rules of procedure (See Government's Exhibit No. 1).

It is not clear on what grounds appellant contends the document fell short of conformance with the applicable laws. He cites no case law to support his unique interpretation of Rule 44(a), Federal Rules of Civil Procedure, and Section 1733, United States Code, Title 28, nor does he specify what portion of these statutes make the certified copy of appellant's selective service file inadmissible.

This Circuit has previously approved the proposition that a duly authenticated copy of the registrant's selective service file is admissible in a prosecution for violation of Title 50 Appendix, United States Code, Section 462.

LaPorte v. United States, 300 F. 2d 878 (9th Cir. 1962;

Yaich v. United States, 283 F. 2d 613 (9th Cir. 1960);

Kariakin v. United States, 261 F. 2d 263 (9th Cir. 1958);

Olender v. United States, 210 F. 2d 795 (9th Cir. 1954).

See also: United States v. Borisuk, 206 F. 2d 338 (3rd Cir. 1953).

Appellant implies that the only way to properly introduce a registrant's selective service file into evidence is to bring into court each and every individual who has at one time worked on the

file, or had the file in his office (Opening Brief, pp. 7-8). Such a procedure would uselessly impede the swift trial of such cases, and clearly conflict with the purpose of Title 28, Section 1733, United States Code.

Wong Wing Foo v. McGrath, 196 F. 2d 120, 123 (9th Cir. 1952).

B. AT THE TIME APPELLANT WAS ORDERED TO REPORT FOR INDUCTION HE WAS PROPERLY CLASSIFIED I-A.

Title 32 Code of Federal Regulations, Section 1622. 10, provides that every registrant who has failed to establish to the satisfaction of the local board, subject to appeal, that he is eligible for classification in another class, shall be placed in class I-A: "Available for military service".

It is the local board's responsibility to decide, subject to appeal, the class in which each registrant shall be placed. Each registrant is considered as available for military service until his eligibility for deferment or exemption from military service is clearly established to the satisfaction of the local board. 32 Code of Federal Regulations, Section 1622. 1(c).

A court may not interfere with a registrant's classification unless it finds that there is no basis in fact for the classification or that the local board acted so arbitrarily and capriciously that the registrant was denied due process.

Witmer v. United States, 348 U.S. 375, 381 (1955);

Dickinson v. United States, 346 U.S. 389 (1953);

Estep v. United States, 327 U.S. 114, 122 (1946);

Cox v. United States, 332 U.S. 442, 448 (1947);

Rogers v. United States, 263 F. 2d 283, 285 (9th Cir. 1959).

A "basis in fact" means one having significance within the legal framework governing selective service classifications.

Badger v. United States, 322 F. 2d 902, 907 (9th Cir. 1963).

As was stated by the United States Supreme Court:

> "The provision making the decisions of the local boards 'final' means to us that Congress chose not to give administrative action under this Act the customary scope of judicial review which obtains under other statutes. It means that the courts are not to weigh the evidence to determine whether the classifications made by the local boards are justified. The decisions of the local boards made in conformity with the regulations are final even though they may be erroneous. The question of jurisdiction of the Local Board is reached only if there is no basis in fact for the classification which it gave the registrant."

Estep v. United States, supra, at 122-123.

It is apparently not argued that the information contained

in appellant's classification questionnaire, and in his letters concerning his attempts to enroll in a college in Mexico, justified any classification other than I-A. Series VIII of the questionnaire (p 7) does not reflect a claim to be a conscientious objector, while appellant's own letters show that he was not a full time student entitled to a II-S classification at the time he was given notice of induction. No other basis for deferment or exemption was shown.

C. EVIDENCE OF APPELLANT'S ATTEMPT TO OBTAIN RECLASSIFICATION AFTER HIS REFUSAL TO SUBMIT TO INDUCTION IS IRRELEVANT TO THE QUESTION OF WHETHER HIS REFUSAL CONSTITUTED A VIOLATION OF LAW.

The trial court is not required to consider action of the local board relative to a claim of conscientious objection filed after appellant's refusal to submit to induction. Evidence of such action has no relevancy as a defense to the criminal conduct charged. Appellant seeks to create the illusion that the action of the board violated due process of law with respect to his classification and thereby rendered the order to report for induction illegal. However, the action of the board is unassailable when considered in view of the evidence it had before it at all times preceding appellant's refusal to submit to induction.

Without exception, in the cases cited by appellant to support his decision, the registrant made some effort to lay a factual basis

for his objection to induction before the time when he was ordered to report. In the case at hand appellant made no claim as a conscientious objector prior to receiving his notice to appear for induction.

The board cannot be criticized for acting reasonably upon information available to it. The case should be evaluated on the basis of (1) the local board's action up to the time of the induction, and (2) the appellant's behavior in defiance of the local board's action. See Cox v. United States, 332 U. S. 442, 454 (1947).

The probability of claims of exemption arising after the mailing of induction notice was anticipated by regulation. 32 Code of Federal Regulations, Section 1625. 2 provides that the classification of a registrant shall not be reopened after the local board has mailed the registrant an order to report for induction, unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which he has no control. This regulation has been upheld as applying to requests to reopen on claims of conscientious objection.

Wyman v. LaRose, 223 F. 2d 849 (9th Cir. 1955);

Feuer v. United States, 208 F. 2d 719 (9th Cir. 1955);

United States v. Biesiada, 247 Fed. Supp. 599 (S. D. N. Y. 1965).

In Keene v. United States, 266 F. 2d 378, 383-84, (10th Cir. 1959), the Court stated:

"It does not seem unreasonable or derogatory to the spirit and purpose of the exempting statute to

provide by regulation that no request for reopening or reclassification shall be entertained after notice to report for induction is mailed. Otherwise, the whole machinery of the selective service process may conceivably be disrupted by last minute changes in status for purposes of avoidance. Such is the manifest purpose of the proviso in Regulation 1625. 2. We think the regulations have application to a conscientious objector's claim as all other claims for a change in status. It seems also entirely consistent with the procedural safeguards provided in the selective service process to say that the circumstances relied on to show a change in status must have occurred after the induction notice was mailed."

The evidence submitted at trial clearly shows that appellant's attempts to obtain a conscientious objector classification fell under the provisions of this regulation. Any evidence purporting to show conscientious objection which was submitted after refusal to submit to induction -- the principal unlawful act -- is irrelevant and not entitled to consideration as a defense to the charge.

D. ASSUMING ARGUENDO THAT SUBSEQUENT ACTION BY THE BOARD WAS RELEVANT TO THE ISSUE OF APPELLANT'S GUILT, AND THE TRIAL COURT SHOULD HAVE CONSIDERED THE LEGALITY OF THE LOCAL BOARD'S REFUSAL TO REOPEN APPELLANT'S CLASSIFICATION, THERE WAS NO VIOLATION OF DUE PROCESS OF LAW.

On June 30, 1965, appellant was mailed an order to report for induction into the armed forces (p. 39). On July 6, 1965, he wrote to his local board applying for classification as a conscientious objector (p. 40), and on July 14 filed a Selective Service Form for Conscientious Objector (p. 42). The local board held a hearing on August 4, 1965, which appellant attended. After hearing from appellant, and considering Special Form for Conscientious Objector, the board declined to reopen his classification (p. 56).

Appellant charges that his local board abused its discretion in declining to reopen his classification and thereby deprived him of appellate review of his classification. There is no quarrel with the principal that arbitrary and capricious action by a local board in refusing to reopen the classification constitutes a violation of due process of law and is action in excess of its jurisdiction. However, appellant's local board did not act in such a manner. The cases cited by appellant are readily distinguishable from his fact situation.

The two unreported District Court cases are of little help, for appellant gives no outline of pertinent facts, but only supplies the court's legal conclusions (Opening Brief, 16-17).

Appellant offers no authority for his contention that a registrant has the right to have his case reopened -- with accompanying appellate opportunity -- when no new circumstances beyond his control were presented to the board.

MacMurray v. United States, 330 F. 2d 928 (9th Cir. 1964), which appellant cites as authority for his contention that the local board should have reopened his case, deals with a defendant who appealed his I-O classification and was refused a hearing by the Justice Department. The Court dealt with the refusal, noting that on appeal the registrant had a right to such a hearing. It is true that after the Justice Department returned the registrant's file to his local board, that board refused to reopen the file, but such action was not an issue in the Court's decision. Clearly the MacMurray case deals with a set of facts not analogous to appellant's situation.

Appellant also cites Stain v. United States, 235 F. 2d 339 (9th Cir. 1956), as his other Ninth Circuit authority. In Stain the local board refused to reopen registrant's file after his armed forces physical, but before he was notified to report for induction. There was substantial evidence that registrant did not know of the I-O classification, that he was of unusually low mentality, and that the local board incorrectly thought that it was required to keep registrant's file closed after he had taken his physical examination. As in MacMurray, the decision in Stain is based on highly dissimilar facts from those in appellant's case.

The local board shall not reopen a registrant's classification

when, upon a registrant's written request to reopen and consider his classification, the facts presented would not in the opinion of the local board justify a change in classification. 32 Code of Federal Regulations, Section 1925. 4.

The classification of a registrant shall not be reopened after the board has mailed the registrant an order to report for induction unless the board first specifically finds there has been a change in registrant's status resulting from circumstances over which he has no control. 32 Code of Federal Regulations, Section 1625. 2.

There was no evidence of a change in appellant's status before the board at the time it reviewed the "new facts" presented by him. Appellant has the burden to establish his right to an exemption.

Fleming v. United States, 344 F. 2d 912 (10th Cir. 1965).

It is submitted that it is also incumbent upon the registrant to present evidence of a change in status resulting from circumstances over which he has no control if he seeks to have his classification reopened after mailing of the order to report for induction. Appellant's special form for conscientious objector fails under the most careful scrutiny to reveal anything suggesting a change in status. It does indicate the presence of an unarticulated attitude which has, according to appellant, existed for a number of years.

Absent any change of status resulting from circumstances

beyond appellant's control, the board cannot reopen his classification. Appellant's case is controlled by this Court's previous ruling in Boyd v. United States, 269 F. 2d 607 (9th Cir. 1959), which involved a tardy claim of conscientious objection and refusal to reopen classification. See also United States v. Monroe, 150 F. Supp. 785 (S. D. Cal. 1957).

If it is found there was evidence supporting a specific finding of a change in appellant's status beyond his control, the question remains whether the board acted in excess of its jurisdiction in concluding that the facts presented by the appellant did not warrant reopening or reclassification.

The question of jurisdiction is reached only if there is no basis in fact for the board's opinion and for continuing appellant in Class I-A.

Estep v. United States, supra.

The task of the Court is to search the records for some affirmative evidence to support the local board's findings, and the courts may properly insist that there be some proof that is incompatible with the registrant's proof of exempt status. His own admissions may be considered by the board as a basis for an inference as to appellant's sincerity and as to qualification of his professed conscientious objection in terms of statutory requirements.

Dickinson v. United States, supra, at 396-97.

Witmer v. United States, supra.

Therefore, if the review of the record before the board indicates any basis in fact for the board's conclusion that appellant's professed belief failed to meet the test of United States v. Seeger, 380 U.S. 163 (1964), that it was a sincere and meaningful belief which occupied in the appellant's life a place parallel to God of those admittedly qualifying for the exemption, judicial inquiry is at an end and the decision of the board must be considered as having been made in conformity with applicable regulations and final, even though it may have been erroneous.

Estep v. United States, supra, 122-23.

Serious question as to the appellant's sincerity is raised by the inconsistencies of his statements and position. The fact that he made no effort to establish his claim until after he was ordered to report for induction suggests that he resorted to the expedient of filing a conscientious objector claim to evade military service and criminal penalty. This possibility is indicated by appellant's statement to his local board that he had planned to be married in May or June, that it did not work out, and so he filed a conscientious objector claim (p. 56).

There is sufficient evidence in appellant's claim to form a basis for the inference that appellant's beliefs were actually rationalized, intellectual in their origin, and moral in their fundamental significance. Religious training and belief, in the context of conscientious objection entitling a registrant to exemption from military service, excludes essentially political, sociological, or philosophical views or a merely personal moral code.

Title 50, Appendix, United States Code, Section 462.

Taking all of these factors into consideration, it is apparent that the local board had a basis in fact for its opinion that the facts presented did not warrant reopening or reclassification. It is submitted, therefore, that the action of the board was not a violation of due process of law.

E. APPELLANT FULLY UNDERSTOOD THE PENALTIES HE FACED WHEN HE REFUSED TO BE INDUCTED. THE PROPER WARNINGS WERE GIVEN.

There is ample evidence in the record (R. T. 42-50, 52) that appellant was given the required warnings of the statutory penalties for refusing to be inducted. Appellant, by his own testimony, understood the penalties for the violation when he refused to step forward (R. T. 46, 14).

Appellant makes a great deal of his contention that the warning was not given between the two opportunities to step forward for induction (Opening Brief, 19-21). It is difficult to understand -- and appellant certainly does not specify -- in what way such failure effected appellant's substantial rights.

In an earlier selective service appeal, involving a technical error in the local board's notice to report for induction, this Court said:

> "Where there has been substantial compliance, so that a man has had all the considera-

tion due him, the courts have refused to reverse for mere technical irregularities."

Mason v. United States, 218 F. 2d 375, 377 (9th Cir. 1954);

quoting United States v. Hagaman, 213 F. 2d 86 (3rd Cir. 1953).

It is suggested that the requirements of Chernekoff v. United States, 219 F. 2d 721 (9th Cir. 1955), cited by appellant (Opening Brief, 20), were met by the inducting officers when the appellant refused to be inducted.

Chernekoff itself distinguishes between minor technical errors and major failure to notify the potential inductee of the rights due him. In Chernekoff ". . . the appellant was not given the prescribed opportunity to step forward nor the prescribed warning," at p. 725. Such was not true in the dealings with appellant, who was in fact given as much, or more, opportunity to reconsider his decision in the face of serious penalties as was required in Chernekoff.

The Court noted at page 725 in Chernekoff that it was not overruling its earlier decision in Bradley v. United States, 218 F. 2d 657 (9th Cir. 1954). In Bradley the inductee was taken aside, warned of the consequences of his refusal to be inducted, signed a statement refusing to be inducted, but did not go through the "step forward" ceremony. Nevertheless the inductee's conviction was upheld, the Court holding that despite the technical violation of the inducting officer, the inductee understood the penalties, and

had adequate opportunity to change his mind. It is suggested that the warning in appellant's case was far more explicit, and more in keeping with technical requirements, than what was approved by this Court in the Bradley case.

A dated, signed statement by the registrant, stating that he refused to be inducted, has supported a conviction although no evidence that he was allowed to go through induction ceremony was presented.

Clark v. United States, 236 F. 2d 13, 20 (9th Cir. 1956); cert. denied 77 S. Ct. 101.

See also: United States v. Van Hook, 284 F. 2d 489, 494 (7th Cir. 1961).

Not only does appellant's authority fall short of criticizing a situation -- such as the appellant's -- where the potential inductee understands the penalties he is facing, but appellant fails to produce an incident of a court being so trifling as to demand that the warning of penalty come between the registrant's two opportunities to step forward.

The evidence leaves no doubt that appellant fully understood what he was doing when he refused to be inducted, due to the proper warnings given by the inducting officers.

VI

CONCLUSION

For the reasons stated, the decision of the trial court should be affirmed.

Respectfully submitted,

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United States of America.

CERTIFICATE

I certify that in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit, and that, in my opinion, the foregoing brief is in full compliance with those rules.

/s/ Gabriel A. Gutierrez

GABRIEL A. GUTIERREZ